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No. 98-9349

In the Supreme Court of the United States

October Term, 1998

STEVEN DEWAYNE BOND, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES OF AMERICA IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENTS

I. THE COURTS OF APPEALS SPECIFICALLY DISAGREE AS TO WHETHER A SEARCH OCCURS WHEN A LAW ENFORCEMENT OFFICER MANIPULATES LUGGAGE IN A MANNER CALCULATED TO REVEAL ITS CONTENTS. 2

II. THE GOVERNMENT'S ARGUMENT THAT MANIPULATION OF LUGGAGE IS LIKE A CANINE SNIFF DEMONSTRATES THE NEED FOR GUIDANCE FROM THIS COURT ON AN IMPORTANT FOURTH AMENDMENT ISSUE. 7

III. THE ISSUE WHETHER THE FOURTH AMENDMENT FORBIDS THE SUSPICIONLESS DETENTION OF BUS PASSENGERS SO THAT THEIR LUGGAGE MAY BE MANIPULATED TO INSPECT FOR DRUGS IS NOT "FACT SPECIFIC." 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

California v. Ciraolo,
476 U.S. 207 (1986) 3

United States v. Bond,
167 F.3d 225 (5th Cir. 1999) . . . . . *passim*

United States v. Gault,
92 F.3d 990 (10th Cir. 1996) 6

United States v. Guzman,
75 F.3d 1090 (6th Cir. 1996) 6

United States v. Liu,
180 F.3d 957 (8th Cir. 1999) 3, 8

United States v. Lovell,
849 F.2d 910 (5th Cir. 1988) 6

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 9, 10

United States v. McDonald,
100 F.3d 1320 (7th Cir. 1996) 2–8

United States v. Most,
876 F.2d 191 (D.C. Cir. 1989) 3

United States v. Nicholson,
144 F.3d 632 (10th Cir. 1998) 2–6, 8

United States v. Place,
462 U.S. 696 (1983) 1, 7, 8

United States v. Washington,
146 F.3d 536 (8th Cir. 1998) 2, 8

Rule

Supreme Court Rule 15.6 1

Pursuant to Supreme Court Rule 15.6, Petitioner Steven DeWayne Bond files this Reply to the Brief for the United States of America in Opposition to his petition for writ of certiorari.

INTRODUCTION

Petitioner Bond, an interstate traveler on a Greyhound bus, was convicted for possessing methamphetamine that was found in his carry-on luggage after a law enforcement officer squeezed and felt the luggage to determine its contents. Bond appealed his conviction, contending that the officer's manipulation of his personal carry-on luggage was an unlawful search. The Fifth Circuit held that the officer's manipulation of Bond's bag was not a search for Fourth Amendment purposes. Bond now petitions the Court to grant certiorari and resolve the Fourth Amendment issue that has divided the circuits. Conceding that there is general disagreement among the circuits, the Government nonetheless opposes Bond's petition. Among other things, the Government contends that review by this Court is not appropriate since the manipulation of luggage in a manner calculated to determine its contents is like the canine sniff that this Court approved in *United States v. Place,* 462 U.S. 696 (1983).

The Government also opposes Bond's request for certiorari on another issue: whether the strict constitutional limits on immigration checkpoint stops are violated by the continued detention of passengers so that their luggage may be manipulated to inspect for drugs. Bond replies briefly to the Government's arguments.

ARGUMENTS

I. THE COURTS OF APPEALS SPECIFICALLY DISAGREE AS TO WHETHER A SEARCH OCCURS WHEN A LAW ENFORCEMENT OFFICER MANIPULATES LUGGAGE IN A MANNER CALCULATED TO REVEAL ITS CONTENTS.

The Government incorrectly characterizes the circuit conflict as a disagreement about "whether handling the exterior of luggage" is a search under the Fourth Amendment. Gov't Br. 7. Based on that characterization, it concedes that "there is disagreement . . . whether an inspection of the general type conducted here constitutes a Fourth Amendment search." Gov't Br. 8. The Government is correct that there is a division among the circuits; its characterization of that division is wrong.

The disagreement among the courts of appeals is not general and it does not involve the simple handling of the exterior of luggage. The disagreement is specific, clear, and direct: The courts are in conflict as to whether a law officer's manipulation of luggage in a manner calculated to determine its contents is a search under the Fourth Amendment. See *United States v. Bond,* 167 F.3d 225, 226–27 (5th Cir. 1999) (manipulation of luggage calculated to detect contraband is not a search); *United States v. Nicholson,* 144 F.3d 632, 639 (10th Cir. 1998) (manipulation of bag to determine if it contained item of evidentiary value is a search); *United States v. McDonald,* 100 F.3d 1320, 1326–27 (7th Cir. 1996) (manipulation of bag to find drugs is not a search); *see also United States v. Washington,* 146 F.3d 536, 537 (8th Cir. 1998) (court has "grave doubts" whether purposeful luggage

manipulation constitutional); *cf. United States v. Most,* 876 F.2d 191, 193, 195 (D.C. Cir. 1989) ("crush technique" to feel bag is search).[1]

The specific issue that *Bond, Nicholson,* and *McDonald* all have in common, and the issue upon which they disagree, is whether a tactile inspection of luggage that is calculated to detect drugs constitutes a search. The Government agrees with the Fifth Circuit that a law enforcement officer's purpose in searching—to feel for drugs—is irrelevant for Fourth Amendment purposes. Gov't Br. 13. Of course, the subjective purpose of law enforcement officers is not determinative of whether a Fourth Amendment search has occurred. *See California v. Ciraolo,* 476 U.S. 207, 213–14 & n.2 (1986) (officers' purpose to look for marijuana irrelevant).

It is not the officer's purpose that is important. Rather, it is the type of manipulation necessary to achieve that purpose that violates the Fourth Amendment. Disagreement about that type of manipulation is what has divided the courts of appeals. An officer whose purpose is to detect drugs packed away in luggage physically manipulates that luggage in a manner that reveals its contents. Objectively, that type of manipulation—the type of manipulation involved in *Bond, Nicholson,* and *McDonald*—is not what any traveler reasonably expects personal hand luggage will be subjected to, either by other travelers, or by law enforcement officers.

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1. The "grave doubts" of the Eighth Circuit were recently echoed by dissenting Judge Bogue in *United States v. Liu,* 180 F.3d 957, 964 (8th Cir. 1999). Judge Bogue criticized the majority's finding that Liu lacked standing as a "detour around the challenged search." *Id.* The judge would have reached the search issue and concluded that a the law officer's manipulation of luggage was a search. *Id.* at 964 (citing *Nicholson* and *Most*).

Bond's case illustrates the type of manipulation that invades a reasonable expectation of privacy in luggage. Border Patrol Agent Cesar Cantu admitted that he squeezed Bond's carry-on luggage, and that he squeezed it "very hard." (Tr. 9, 30.)[2] His manipulation permitted the officer to feel "a brick-like object" with "an outline of something of different mass inside of it." (Tr. 9.) Although the brick of methamphetamine in Bond's luggage was wrapped in tape, and then wrapped again in a pair of pants, the officer's tactile inspection was probing enough to reveal the "edges of the brick," a brick that was "hard." (Tr. 10.)

Like the tactile inspections in *Nicholson* and *McDonald,* the officer's "manipulation of Bond's bag was calculated to detect contraband." *Bond,* 167 F.3d at 227. Agent Cantu, seeking to determine whether Bond's luggage contained drugs, squeezed the bag in a manner that revealed its contents. Other passengers do not squeeze luggage in that manner. They may push or pull luggage to make room for their own; the luggage may be squeezed against other luggage in those efforts; but fellow passengers do not squeeze luggage with their hands or manipulate it in a manner that reveals its contents.

As the Tenth Circuit held in *Nicholson,* that type of probing manipulation invades an expectation of privacy that society accepts as reasonable: "By manipulating [Nicholson's] bag in a manner [he] did not reasonably expect from other passengers, Detective Leach conducted a search." 144 F.3d at 639. The *Nicholson* court's recognition of the critical difference

2. References are to pages of the transcript of the hearing on Bond's suppression motion.

between an officer's probing manipulation and bus passengers' casual touching, pushing, or moving of luggage, is what led it to "part company with the Seventh Circuit's" decision in *McDonald*. *Nicholson, id.* (citing *McDonald,* 100 F.3d at 1326)). The same disagreement led the Fifth Circuit in this case to reject the Tenth Circuit's reasoning in *Nicholson*. *Bond,* 167 F.3d at 227 (citing *Nicholson,* 144 F.3d at 639)).[3]

The Government's meticulous parsing of the facts of Bond's case fails to obscure this real and direct conflict among the courts of appeals. Gov't Br. 8–15. For example, there is no determinative significance to the fact that the officer in *Nicholson,* unlike the officer in *Bond,* removed luggage from the overhead rack before he manipulated it. Although the Government suggests *Nicholson*'s result may have turned on this factual distinction, the Government admits that, "[i]t is not obvious, as an analytical matter, why the removal of the bag before its manipulation should make a difference in the outcome." Gov't Br. 13–14.

Similarly, the Government's attempt to compare the facts of Bond's case to other luggage cases does not change the nature of the fundamental and specific disagreement between the courts of appeals. Before the Seventh Circuit's decision in *McDonald,* various courts of appeals had ruled that minimal touching of the exterior of luggage was not a search. For example,

3. This basic disagreement was at the heart of Seventh Circuit Judge Ripple's dissent in *McDonald*. Judge Ripple pointed out that the officer's manipulation of luggage was "a tactile inspection by an expert examiner aimed at discovering the nature of the contents of the bag." 100 F.3d at 1333. Such an examination is "hardly the sort of occasional touching that a person expects his hand luggage to endure in an overhead rack." *Id.*

no search occurred where an officer merely "placed his hand on" a bag and asked to whom it belonged. *United States v. Guzman,* 75 F.3d 1090, 1092 (6th Cir. 1996).[4] No search occurred where an officer kicked and lifted a bag that was protruding into the aisle of a bus. *United States v. Gault,* 92 F.3d 990, 992-93 (10th Cir. 1996).[5] And, no search occurred where a bag checked with an airline had its sides compressed by an officer to release air so that he could smell for drug odor. *United States v. Lovell,* 849 F.2d 910, 911 (5th Cir. 1988).[6]

The Seventh Circuit's decision in *McDonald* was a giant leap beyond these cases; it was "a milestone in the unfolding of . . . Fourth Amendment jurisprudence." *McDonald,* 100 F.3d at 1333 (Ripple, J., dissenting). As Judge Ripple observed, before *McDonald,* "[n]o American court [had] allowed the police, acting without any suspicion, any permission, or any exigent circumstances, to intrude deliberately into the privacy of the interior of a person's luggage." *Id.* at n.16. *McDonald* gave law officers who lacked probable cause, or even reasonable suspicion, license to walk through public buses and trains and randomly manipulate hand-carried luggage to determine its contents. 100 F.3d at 1333. In *Nicholson,* the Tenth Circuit rejected *McDonald*'s holding. 144 F.3d at 639. In *Bond,* the Fifth Circuit embraced it. 167 F.3d at 227. This Court should grant certiorari to resolve this clear, direct, and specific disagreement among the courts of appeals.

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4. Relied upon by the Government at page 10 of its brief.

5. Relied upon by the Government at pages 11-12 of its brief.

6. Relied upon by the Government at page 15 of its brief.

II. THE GOVERNMENT'S ARGUMENT THAT MANIPULATION OF LUGGAGE IS LIKE A CANINE SNIFF, DEMONSTRATES THE NEED FOR GUIDANCE FROM THIS COURT ON AN IMPORTANT FOURTH AMENDMENT ISSUE.

The Government contends that the officer's manipulation of Bond's bag to discover its contents was minimally intrusive, "[l]ike the 'canine sniff' of luggage that this Court held not to be a search in *United States v. Place,* 462 U.S. 696 (1983)[.]" Gov't Br. 9. This Court's implicit approval of a canine sniff has now been expanded to justify a law enforcement officer's physical manipulation of luggage to determine its contents. Gov't Br. 9; *see McDonald,* 100 F.3d at 1325 n.7 (citing *Place*).

The sniff in *Place* "disclose[d] only the presence or absence of narcotics, a contraband item." 462 U.S. at 707. "[N]o other investigative procedure . . . is so limited in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.* It is a far cry from the "*sui generis*" canine sniff in *Place*[7] to the intrusive and revealing manipulation of luggage that occurred in this case, and that occurs whenever an officer squeezes and feels luggage to determine its contents.

The manipulation described by Agent Cantu, and acknowledged by the Fifth Circuit to be a method "calculated to detect contraband," *Bond,* 167 F.3d at 227, was readily capable of revealing more than just drugs. It could have revealed the presence of a videotape, eye glasses, medicine containers, personal hygiene items, or a myriad of private objects carried in personal hand luggage. Indeed, fragile items could be damaged, containers breached,

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7. 462 U.S. at 707.

or contents spoiled, by the type of hard squeezing and manipulation that Agent Cantu used to discover the contents of Bond's luggage. Such manipulation is not like a canine sniff.

Neither *Place* nor any other precedent of this Court has approved the suspicionless manipulation of luggage to determine whether it contains drugs. Yet, this intrusive "inspection" method is employed by law enforcement officers around the country.[8] Because of these inspections' broad impact, and the importance of this Fourth Amendment issue, this Court should grant certiorari to provide guidance to the courts of appeals.

III. The Issue Whether the Fourth Amendment Forbids the Suspicionless Detention of Bus Passengers So That Their Luggage May Be Manipulated to Inspect for Drugs Is Not "Fact Specific."

The Government argues that the Fifth Circuit "properly rejected" Bond's "fact-specific claim" that he was unlawfully detained so that a Border Patrol agent could manipulate his luggage in search of drugs. Gov't Br. 16. While the facts of Bond's case demonstrate a Fourth Amendment violation, his argument is not "fact-specific." Moreover, it was not properly rejected.

The Border Patrol's routine procedure, employed in Bond's case, shows that interstate bus travelers at the Sierra Blanca, Texas, immigration checkpoint are regularly and unlawfully detained to permit suspicionless luggage "inspections" for drugs after the immigration check is complete.

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8. In unpublished opinions, the Fifth Circuit decided two cases in 1993 that involved luggage manipulation. *See Bond*, 167 F.3d at 227 n.2. The published opinions in *Bond*, *McDonald*, *Washington*, and *Liu*, show that the manipulation of luggage is employed in the Fifth, Seventh, and Eighth Circuits. It was employed in the Tenth Circuit until *Nicholson*.

Agent Cantu testified that "we conduct an inspection of the overhead luggage by squeezing the bags as we're going out." (Tr. 6.) On cross-examination, Cantu elaborated that he also looked under seats for luggage, and that he "sometimes" had to ask passengers to move. (Tr. 31–32.)[9]

Agent Cantu also admitted that the luggage inspection in Bond's case was "the way" he "usually" carried out commercial bus inspections: after reaching the back of the bus, Cantu would conduct a "nonimmigration inspection" by squeezing bags as he "work[ed] [his] way up" to the front. (Tr. 30.) As set forth in Bond's petition, the Fourth Amendment issue posed by his unlawful detention has broad importance; it is not fact specific.

The Government's argument that the Fifth Circuit's ruling was correct hinges on two points: (1) Cantu's luggage inspection did not cause "a delay of any consequence," and (2) *Martinez-Fuerte* does not prohibit an officer "from proceeding toward the exit at the front of the bus at a reasonable pace." Gov't Br. 16.[10] The delay was of "consequence" because of what the officer did while he delayed the bus's departure: he manipulated luggage to detect drugs in violation of the Fourth Amendment's strict limits on immigration checkpoint stops, as set forth in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Bond Pet. 11–13.

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9. The Government seemingly questions these facts by noting that information about luggage under the seats is "apparently based on testimony that the district court did not adopt (or explicitly reject)." Gov't Br. 17 n.7. The district court did not repeat all of Agent Cantu's factual assertions in its findings. Nonetheless, Agent Cantu testified, without contradiction, that he looked under seats for luggage and sometimes had to ask passengers to move. (Tr. 31–32.)

10. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

Of course, *Martinez-Fuerte* does not dictate the speed of a Border Patrol agent's exit from a bus. However, it is disingenuous for the Government to characterize Agent Cantu's luggage inspection as simply an exit conducted "at a reasonable pace." Gov't Br. 16. After stopping a busload of approximately 45 people for a strictly-limited immigration check, the Border Patrol agent extended the passengers' detention so that he could manipulate their luggage in search of illegal drugs. (Tr. 5–6, 8–9, 25, 39, 42, 67.) This abuse of the limited Fourth Amendment exception created by *Martinez-Fuerte* should be addressed by this Court.

CONCLUSION

FOR THESE REASONS, and for the reasons set out in Bond's petition, the Court should grant certiorari and review the questions presented in this case.

Respectfully submitted.

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UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

The undersigned, an attorney, a member of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, she served the Reply to the Brief for the United States of America in Opposition on the Counsel for Respondent by enclosing one copy in an envelope, with first-class postage prepaid, addressed to counsel of record at his post office address:

The Honorable Seth P. Waxman
Solicitor General of the United States
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and depositing same in a United States mailbox at San Antonio, Texas, on September 14, 1999; and further certifies that all parties required to be served have been served.

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Re: **Steven DeWayne Bond**
v. United States of America
Cause No. 98-9349

Dear Mr. Suter:

I have enclosed for filing an original and ten copies of the Petitioner's Reply to the Brief of the United States of America in Opposition in this cause.

I have mailed a copy of this letter and a copy of the reply to the Honorable Seth P. Waxman, Solicitor General of the United States (Attn: William D. Brown), Department of Justice, 10th Street and Constitution Avenue, NW, Room 5614, Washington, D.C. 20530; and to Joseph H. Gay Jr., Assistant United States Attorney, Western District of Texas, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216.

Thank you for your attention to this matter.

Very truly yours,

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